Malaysia Building Society Bhd v Univein Sdn Bhd

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO MT4–24–808 OF 1997
SURIYADI J
11 MARCH 2003

Evidence *— Judicial notice — Fundamental infirmities apparent on valuation report contained in affidavit — Location of comparables in relation to subject properties not identifiable on photostated copy of map in valuation report — Whether original government issued map could be produced to assist the court in resolving matter — Evidence Act 1950, ss 2, 57(1)(j)*

Land Law *— Valuation report — Fundamental infirmities apparent on valuation report — Location of comparables in relation to subject properties not identifiable on photostated copy of map — Whether original government issued map could be produced to assist the court in resolving matter*

The defendant's three pieces of land ('the said lands') were the subject of a High Court order of foreclosure. In a summons for direction hearing, the defendant failed to file an affidavit in reply to the plaintiff's supporting affidavit containing a valuation report, and as a result the deputy registrar had fixed the gross reserved price at RM27,680,000 for the sale of the said lands. In this appeal to the judge in chambers, the defendant contended that the value given to the said lands was unsubstantiated and thus unsafe to be accepted as there were certain fundamental infirmities apparent on the valuation report. In the photostated map supplied in the valuation report, the plaintiff's valuer had failed to indicate the whereabouts of the location of the comparables (lots found in a location known as 'section 57') in relation to the said lands (identifiable as lots within a location known as 'section 63'). The plaintiff countered that it was in possession of the original government issued map, from which the sized-down, photostated copy was duplicated, and which could assist the court in resolving the matter. The plaintiff prayed for the invocation of the provisions of ss 56 and 57 of the Evidence Act 1950 for judicial notice to be taken of the original government issued map. The defendant in turn raised a number of preliminary objections: (i) the plaintiff's application was an attempt to produce the map at a late stage of the proceedings; and (ii) s 2 of the Evidence Act 1950 inhibited the plaintiff's application.

Held, dismissing the appeal with costs:

(1) An appeal to a judge in chambers is a rehearing, with both parties permitted to reopen their cases and to canvass new issues, if the need arises. Thus, the plaintiff's attempt to produce the original government issued map was acceptable. It was also not an introduction of fresh evidence as such, but an exercise to obtain clarification of the sized-down, photostated copy in the affidavit from the larger, original map (see pp 399H–400B).

(2) Under the first part of s 2 of the Evidence Act 1950, the provisions of the Act would be applicable '... to all judicial proceedings in or before any court', with the present hearing qualifying as one. The invocation of ss 56 and 57 was pursuant to such judicial proceedings, and thus fell squarely under the first part of s 2 (see pp 400I–401B).

(3) The phrase 'the geographical divisions of the world' in s 57(1)(j) of the Evidence Act 1950 should not be restricted merely to cross border geographical divisions, meaning international divisions. There was no legal logic why the terminology 'the world' could not include the internal geographical divisions. Judicial notice of the original government issued map thus came within this provision. Further, under s 36 of the Evidence Act 1950, statements of facts in issue or relevant facts made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Government of Malaysia or of any state as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts. Therefore, indications or entries of the legends 'section 57' and 'section 63' or their whereabouts in the original map, if any, would be incontrovertibly relevant (see pp 401F–G, 402B–D).

(4) A scrutiny of the original government issued map showed that section 57 and section 63 were practically neighbors, located at the fringes of the Kuala Lumpur City Centre area, though at opposite ends. The comparables were evidently reasonable comparables, inter alia, they were of about the same sizes, located in the same vicinity, transacted rather recently, and with sale values that were not too excessive or low in comparison with the projected price of the subject properties (see p 402E–F).

[Bahasa Malaysia summary

Tiga bidang tanah defendan ('tanah-tanah tersebut') merupakan perkara perintah halang tebus Mahkamah Tinggi. Di dalam perbicaraan saman untuk arahan, defendan gagal untuk memfailkan suatu afidavit jawapan kepada afidavit sokongan plaintif yang mengandungi laporan penilaian, dan sebagai akibat, penolong pendaftar telah menetapkan harga rizab kasar pada RM27,680,000 untuk jualan tanah-tanah tersebut. Di dalam rayuan di hadapan hakim dalam kamar, defendan telah menyatakan bahawa nilai yang diberi kepada tanah-tanah tersebut tidak disahkan dan oleh itu tidak dapat diterima kerana ia mempunyai kelemahan asasi yang jelas pada laporan penilaian tersebut. Di dalam peta yang difotostatkan yang dilampirkan di dalam laporan penilaian tersebut, jurunilai plaintif telah gagal menunjukkan di mana lokasi bandingan (lot-lot yang dikenalpasti sebagai lot-lot di dalam kawasan yang dikenali sebagai 'seksyen 57') yang berkaitan dengan tanah-tanah tersebut (dikenali sebagai lot-lot di dalam kawasan 'seksyen 63'). Plaintif telah

membalas bahawa ia memegang peta asal yang dikeluarkan oleh kerajaan, daripada mana salinan yang difotostatkan dan dikurangkan saiznya telah disalin, dan yang boleh menolong mahkamah menyelesaikan perkara ini. Plaintif telah memohon penggunaan ss 56 dan 57 Akta Keterangan 1950 supaya pengiktirafan kehakiman diambil ke atas peta asal yang dikeluarkan oleh kerajaan. Defendan pula telah membangkitkan bantahan awal bahawa: (i) permohonan plaintif merupakan percubaan untuk mengemukakan peta pada tahap lewat prosiding; dan (ii) s 2 Akta Keterangan 1950 menghalang permohonan plaintif.

Diputuskan, menolak rayuan dengan kos:

(1) Rayuan kepada hakim dalam kamar merupakan perbicaraan semula, dengan kedua-dua parti dibenarkan membuka semula kes mereka dan untuk merayu isu-isu baru, jika diperlukan. Oleh itu, percubaan plaintif untuk mengemukakan peta asal yang dikeluarkan oleh kerajaan boleh diterima. Ia juga bukan merupakan pengemukaan keterangan baru, tetapi bertujuan untuk memperoleh penjelasan mengenai salinan fotostat di dalam afidavit yang telah dikurangkan saiznya daripada peta asal yang lebih besar (lihat ms 399H–400B).

(2) Di bawah bahagian pertama s 2 Akta Keterangan 1950, peruntukan Akta tersebut adalah terpakai '... to all judicial proceedings in or before any court', dan perbicaraan ini termasuk di dalam peruntukan tersebut. Penggunaan ss 56 dan 57 adalah menurut prosiding kehakiman dan termasuk di bawah bahagian pertama s 2 (lihat ms 400I–401B).

(3) Frasa 'the geographical divisions of the world' di dalam s 57(1)(j) Akta Keterangan 1950 tidak patut dihadkan kepada silang sempadan bahagian-bahagian geografi, iaitu bahagian-bahagian antarabangsa. Tiada logik undang-undang kenapa istilah 'the world' tidak boleh termasuk bahagian-bahagian geografi dalam negeri. Pengiktirafan kehakiman peta asal yang dikeluarkan oleh kerajaan termasuk dalam peruntukan ini. Seterusnya, di bawah s 36 Akta Keterangan 1950, pernyataan-pernyataan fakta dalam isu ataupun fakta-fakta yang relevan yang dibuat di dalam peta atau carta bercetak yang ditawar untuk pembelian awam, ataupun di dalam peta-peta, carta-carta atau pelan-pelan, merupakan fakta-fakta relevan. Oleh itu, tanda-tanda atau catatan petunjuk-petunjuk 'seksyen 57' dan 'seksyen 63' atau di mana tempat-tempat itu, jika ada, adalah tidak dapat dipertikaikan relevan (lihat ms 401F–G, 402B–D).

(4) Kelemahan-kelemahan yang dikesan di dalam laporan penilaian telah diatasi dan cadangan-cadangan boleh digunakan dengan selamat. Penelitian peta asal yang dikeluarkan oleh kerajaan menunjukkan bahawa seksyen 57 dan seksyen 63 adalah berjiran, ditempatkan di pinggir kawasan Kuala Lumpur City Centre,

walaupun pada kawasan bertentangan. Bandingan yang diambil merupakan bandingan yang wajar, antaranya, bandingan tersebut bersaiz lebih kurang sama, bertempat di kawasan yang sama, dijual baru-baru ini dan dengan nilai jualan yang tidak terlalu tinggi atau rendah berbanding dengan harga hartanah yang diunjurkan (lihat ms 402E–F).

Notes

For cases on judicial notice, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1664-1684.

Cases referred to

Bank Kerjasama Rakyat Malaysia v Daya Plaza Sdn Bhd and third party [1998] MLJU 400

Dato Mohamed Hashim Shamsuddin v Attorney-General, Hong Kong [1986] 2 MLJ 112

Eight Development (M) Sdn Bhd v Antara Steel Mills Sdn Bhd Guaman No 22–390–96

Malayan United Finance Bhd v Adsonii (M) Sdn Bhd [1990] 2 CLJ 254

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281

Ong Thim Kuang, Re; ex p Public Bank Bhd and other cases [2000] 5 MLJ 442

Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332

PP v Chu Beow Hin [1982] 1 MLJ 135

PP v Saad bin Mat Takraw & Anor [1998] 3 MLJ 784

Sama Corporation Sdn Bhd, Re; CI Holdings Bhd v Jabatan Pemegang Harta [1992] 2 MLJ 251

Legislation referred to

Evidence Act 1950 ss 36, 56, 57, (1)(a)–(o), (3), 63, 83

Rules of the High Court 1980 O 56 r 1(3A)

Wong Kian Kheong (*Lee Hishammuddin*) for the plaintiff.

KL Pang (*Cheah Teh & Su*) for the defendant.

Suriyadi J: Pursuant to a summons for direction hearing, the deputy registrar on 7 November 2002 had fixed the gross reserved price at RM27,680,000 for the sale of three pieces of land which were earlier subject to a High Court order of foreclosure. It was apparent to all and sundry that the summons for direction had a supporting affidavit which contained a valuation report whilst the defendant had filed no affidavit in reply. With no affidavit in reply forthcoming, the latter's position outwardly appeared precarious.

Even though acknowledging that this was a hearing by affidavit, counsel for the defendant still requested for permission to be heard, which request was obliged by the deputy registrar. After a brave attempt by the defendant,

and inspite of the ventilation of his views, the deputy registrar had meted out the current order, to be promptly followed by the defendant's notice of appeal.

Although I had stressed the necessity of evidence being given on oath as it is a principle fundamental to Malaysia's adversarial system, the defendant's counsel before me in this appeal had strenuously applied to express his views again from the Bar table, founded on the reason of there being certain fundamental infirmities apparent on the valuation report (*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281). As much as I abhorred the idea of ignoring the basic tenets of the law of evidence, especially when there was an uncontradicted position taken in the report by the valuer of the plaintiff, due to its intrinsic dissatisfactory reporting, I permitted him to continue (see *Re Sama Corporation Sdn Bhd; CI Holdings Bhd v Jabatan Pemegang Harta* [1992] 2 MLJ 251). I could not don on blinkers in the circumstances of the case, to borrow the phrase of the defendant's counsel, and ignore the obvious that two plus two could not be six. With advancing the course of justice in mind, I permitted him to assist the court.

The market value of the subject properties, free from all encumbrances, was opined by the plaintiff's valuer, ie CH Williams Talhar & Wong, to be RM27,680,000. As said earlier, with such a positive assertion and without the availability of any contradictory valuation report, in the normal course of events, without more, I would not have hesitated to dismiss the appeal with costs. It is a well settled principle that where a party makes a positive assertion, and there is failure on the part of the opponent to dispute or contradict that assertion, the latter is deemed to admit the fact so asserted (*Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332). Unfortunately, the matter before me was not as straightforward as I had thought.

The subject lands here were identifiable as lots 147, 167 and 210 with their locations in section 63. A cursory perusal of the valuation report showed that the comparables were lots 777, 778, 924, 926, 163, all being in section 57. Yet it was quite clear, even during the brief exchanges between the court and the parties, that the plaintiff's valuer had failed to indicate the whereabouts of the location of the comparables in relation to the subject properties in the photostated map supplied in the valuation report. In a gist, the defendant had submitted that, with the valuation report peppered with loopholes, the value given to the subject properties were unsubstantiated and thus unsafe to be accepted. To substantiate its stance, the defendant averted to a few cases in the like of *Eu Finance Bhd lwn Sim Sen Organization Bhd* [1990] 2 MLJ 357; *Re Sama Corporation Sdn Bhd; CI Holdings Bhd v Jabatan Pemegang Harta* and *Eight Development (M) Sdn Bhd v Antara Steel Mills Sdn Bhd* (Guaman No 22–390–96).

Touching on the three cases supplied above, I had no difficulty in rejecting them as they were distinguishable, irrelevant and perhaps prejudicial to the defendant's case. I begin with the case of *Eight Development (M) Sdn Bhd v Antara Steel Mills Sdn Bhd* where despite the availability of a rebuttal valuation report supplied by the defendant, the

court still rejected it. To the presiding judge, it was quite obvious that the rebuttal report was at best weak, as the information considered by the valuer was hearsay based. Surely, if the availability of a rebuttal valuation report could not save the day for the defendant, the lack of it would definitely make the defendant's case unbearable. As regards the other two cases, namely, *Eu Finance Bhd lwn Sim Sen Organization Bhd* and *Re Sama Corporation Sdn Bhd; CI Holdings Bhd v Jabatan Pemegang Harta* it was quite obvious in the first case that the defendant had submitted an application to set aside the sale order and was strongly backed by a valuation report (TKC 15). The plaintiff's report on the other hand was unreliable and tainted as it was a desk valuation without the maker surveying the impugned land. The second case was just as bad as not only did the plaintiff's valuation reports not indicate any evidence of values of comparative properties, but also had not even been signed by the maker. The applicants/appellants who were the creditors, and who had objected to the court's order, on the other hand did not make things easy for the respondent, as they had filed their affidavits in reply, with the necessary rebuttal reports enclosed and which averments were not disputed. On that score, how could Zakaria Yatim J (as his Lordship then was), not conclude that the earlier court order was not founded on a proper valuation report, a report which in the process was vitiated by other reliable valuation reports. Based on the rationale stated above, the cases supplied by the defendant were inapplicable and in fact had militated against the interest of the latter.

I now return to the main case. Undeterred, the plaintiff's counsel when questioned about the inadequacy of the photostated map, had countered by revealing that it was in possession of the original government issued map from which the photostated copy was duplicated and which could assist the court in resolving the matter once and for all. Unfortunately, he was faced with the monumental task of producing it as there were many procedural obstacles facing him. I was not unaware that that photostated map in the valuation report had been miniaturized from the main map, which I suspected by inadvertence, had missed out the relevant legends of 'section 57' and 'section 63'. From that photostated copy, I could pinpoint section 43, the location of KLCC and even the subject properties, but regretfully not the comparables. Perhaps realizing the unintended error, counsel for the plaintiff had prayed that I invoke the provisions of ss 56 and 57 of the Evidence Act 1950, which permitted me to take judicial notice of certain facts. Once I had decided to do so, then no facts of which I had decided to take notice of was required to be proved (s 56). The relevant question that could not be avoided and which will be answered later (after having resolved the other preliminary objections), was if I were to acquiesce to that application, under which illustration of s 57(1) from (a)–(o) of the Act should it be?

The first preliminary objection pertaining to this application was the vehement objection of the defendant of the plaintiff's attempt to produce the map from the Bar table. My comment was that what is sauce for the goose was also sauce for the gander. Why complain about another when one was similarly not blameless? The fact that the application was at the appeal

stage was of no help to the plaintiff either, so said the defendant. I brushed aside that view too, as an appeal to a judge in chambers was a rehearing, with both parties permitted to reopen their cases and to canvass new issues, if the need arises. It was also not a question of the introduction of fresh evidence, say under O 56 r 1(3A) of the Rules of the High Court 1980 (PU(A)50/1980), but an exercise to obtain clarification from the larger and original copy. In all certainty, no one would be prejudiced by the court's desire to go to the bottom of the matter in the circumstances of the case.

The other objection was that due to the inhibitive provision of s 2, the application was misconceived as it was legally not permitted. This section reads:

> This Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator.

Returning to the facts, it was indisputable that the impugned unsatisfactory photostated copy of the map meant to support the summons for direction was indeed exhibited in the affidavit. By virtue of that nexus, the defendant had argued that any production of the original to overcome that flaw, ie by invoking the 'judicial notice' provision, was not permissible. The case of *Re Ong Thim Kuang; ex p Public Bank Bhd and other cases* [2000] 5 MLJ 442 was brought to my attention, to deny the plaintiff's application. The facts of the latter case were clearly distinguishable to the current matrix of the case, as the matter there pertained to the inapplicability of the Evidence Act 1950 in relation to the affidavit under scrutiny.

Historically speaking, prior to 1849, no punctuation normally appeared in the Acts on the Rolls of Parliament in England, with its insertion thereafter becoming the norm. Just as a court must give effect to the clear and explicit language of any enacted words in any statute, likewise there is no legal premise why punctuations, though a minor element in the construction of a statute, used to separate sentences and phrases, etc and to clarify their meanings, should be brushed aside (*Public Prosecutor v Chu Beow Hin* [1982] 1 MLJ 135). It has a purpose and some consideration must be given to it. Abdoolcader SCJ in *Dato Mohamed Hashim Shamsuddin v Attorney-General, Hong Kong* [1986] 2 MLJ 112 had the opportunity to remark at p 122:

> In answer to me as to the significance of the comma after the words 'letter of request' in para (1) of s 16 he says it does not in any way affect the position. I wholly reject this contention. Its punctuation forms part of any statutory enactment and may be used as a guide to interpretation. *The day is long past when the courts would pay no heed to punctuation in any written law ... and the presence or absence of a comma may be highly significant.* (Emphasis added.)

A microscopic perusal of s 2 will highlight that there are two parts to that provision due to the promulgation of the punctuation mark (',') after '... *in or before any court,*'. In no uncertain terms could I ignore that punctuation, in this case that comma, as it was abundantly clear that it had a role to play in that piece of legislation. It thus follows that by that disjunctive comma, the Evidence Act 1950 would be applicable '... *to all judicial proceedings in or*

before any court', with the hearing before me certainly qualifying as one. Its inapplicability will be triggered the moment the invocation of the Act is intended to fall under the second part, ie '*to affidavits, presented to any court or officer nor to proceedings before an arbitrator*'. Invariably, if I were to invoke ss 56 and 57 with that intention in mind, then the defendant's argument would have some merit. As it were, I was satisfied that the invocation of the latter two provisions were pursuant to a judicial proceeding, and thus would have fallen squarely under the first part of s 2. With all the preliminary issues resolved, I had thereafter accordingly invoked the 'judicial notice' provisions.

So, under which illustration of s 57 should the matter under discussion be? After having considered the law and the evidence, I was satisfied that the matter came within the four corners of s 57(1)(j), read together with ss 56, 83 and 36. Section 57(1)(j) provides:

> (1) The court shall take judicial notice of the following facts:
> (a) ...
> (b) ...
> (j) the ordinary course of nature, natural and artificial divisions of time, *the geographical divisions of the world* ... (Emphasis added.)

To sidetrack a little, on the issue of selecting the correct illustration, it is quite settled that the list in s 57 is not exhaustive due to the difficulties of providing a comprehensive one. The changes of time have not made things easier either. Syed Agil Barakhbah SCJ in *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30 had occasion to opine at p 31:

> In so far as judicial notice is concerned, the provisions of s 57 *sub-s (1) makes it mandatory* for the court to take judicial notice of ... matters that are enumerated in sub-s (1)(a) to (o) of the section. *The list however is not exhaustive since it is impossible to make a really complete list* ... . The important point to note is that s 57 does not prohibit the courts from taking judicial notice of other facts not mentioned therein. (Emphasis added.)

Returning to the mainstream, ie as to the interpretation of s 57(1)(j), an intense scrutiny of the phrase '*the geographical divisions of the world*', persuaded me to construct that it should not be restricted merely to cross border geographical divisions, meaning international divisions. There is no legal logic why the terminology 'the world' cannot include the internal geographical divisions. Nothing has been legislated into it to indicate that internal geographical divisions are too frivolous, puny or unworthy to be grouped along with international geographical divisions. If Malaysia or any small part of Malaysia is an integral part of the world, why deny it its rightful place in this globe? Returning to the matter at hand, I only wanted to know the positions of sections 67 and 57 vis-à-vis the comparables, in relation to their geographical divisions only, and not the precise distance between them. Had I desired the latter, I would certainly have surrendered to the flack (*Public Prosecutor v Saad bin Mat Takraw & Anor* [1998] 3 MLJ 784).

Certainly a government issued map would have resolved the above query once and for all. How could it not be so, as under s 83 the court shall

presume that maps or plans purporting to be made by the authority of the Government of Malaysia or the government of any state, was so made and accurate. A cursory look of 1/d1 (the original map) indicated that it had been endorsed by the Jabatan Ukur Wilayah Persekutuan, carrying with it the reference number of Bil 135/2522. The defendant on its originality and authenticity took up no objection.

For purposes of my quest, which entailed my detailed scrutiny of the original map, s 36 of the Evidence Act 1950 was highly pertinent. Under the latter provision, statement of facts in issue or relevant facts made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Government of Malaysia or of any state as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts. *Sarkar's Law of Evidence* at p 705 had authored that 'the words "statements of facts" in the beginning of the section evidently mean statements of general geographical facts, eg physical features, boundaries, situation, relative position of countries, districts, towns, villages, topographical description, distance, etc usually stated in maps'. Therefore, indications or entries of the legends 'section 57' and 'section 63' or their whereabouts in the original map, if any, would be incontrovertibly relevant.

Having dealt with the preliminary matters, I had requested for the production (as opposed to tendering) of the government issued map by the plaintiff's counsel pursuant to s 57(3) of the Evidence Act 1950, which for convenience and as a point of reference had been referred to as 1/d1. A scrutiny of the map enlightened me beyond doubt that sections 57 and 63 were practically neighbours, and were located at the fringes of the world famous Kuala Lumpur City Centre area, though at opposite ends. With that information elicited from the map, I was satisfied that the comparables were evidently reasonable comparables, inter alia, they were of about the same sizes, located in the same vicinity, transacted rather recently, and with sale values that were not too excessive or low in comparison with the projected price of the subject properties. No criticism also could be leveled against the valuation report on the method applied, as the comparison method had been alluded to (*Eu Finance Bhd lwn Sim Sen Organization Bhd*).

That being so, I had concluded that the infirmities detected in the valuation report had been overcome, paving the way for me to safely use the recommendations of the report. Having sieved the one-sided report, as there was no rebuttal evidence submitted by the defendant, the passage was smooth sailing for me to affirm the order of the deputy registrar (*Malayan United Finance Bhd v Adsonii (M) Bhd* [1990] 2 CLJ 254; *Bank Kerjasama Rakyat Malaysia v Daya Plaza Sdn Bhd and third party* [1998] MLJU 400). On that note, I had dismissed the appeal with costs.

Appeal dismissed with costs.

Reported by Joel Ng